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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

JOHN VENTURA, DAVID O. CHAMBERS, PAUL J. DUNHAM, STEVEN P. BONEY, ADRIANE ANDERSON D/B/A ANDERSON COURIER SERVICE, TIM RUSK, STEVEN LIVENS, LOIS LIVENS, JOHN G. HEATHER, and DIRECT MAIL MARKETING, INC.,
Petitioners,

vs.

DAN MORALES, Attorney General,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

1. Does the First Amendment standard of review articulated in *Bose Corp. v. Consumers Union of the United States, Inc.*, 466 U.S. 485 (1984), allow a court of appeals to review *de novo,* rather than by the clearly erroneous standard of F.R.Civ.P. 52(a), the findings of a trial court *striking down* a State barratry statute as violating the First Amendment?

If the First Amendment allows a court of appeals to review *de novo*, does the First Amendment or other law require that a court of appeals articulate its findings of fact and conclusions of law in a manner similar to F.R.Civ.P. 52(a)?

2. May a district court, applying *Cincinnati v. Discovery Network, Inc.*, 113 S.Ct. 1505 (1993) give close scrutiny to a State barratry statute criminalizing direct mail solicitation within 30 days of an accident where, because of anticompetitive motivation, the statute favors the speech of insurance company adjusters and lawyers and disfavors the speech of personal injury lawyers, or does *Florida Bar v. Went for It, Inc.*, 115 S.Ct. 2371 (1995) establish a new rule that a content-based, discriminatory commercial speech prohibition is subject to scrutiny *only* under the standard of

Central Hudson Gas & Elec. Corp. v. Public Service Comm'n, 447 U.S. 557 (1980)?

3. May a district court, applying *Central Hudson*, decide that a State barratry statute criminalizing direct mail solicitation within thirty days of an accident is a bad "fit" where the State has adopted a more narrow and direct means of promoting the professionalism of lawyers and the privacy of accident victims, namely, submitting for review by the State Bar copies of all written solicitations prior to or concurrently with the solicitation?

May a district court, in such circumstances, decide that a barratry statute is a bad "fit" where there is no economically feasible means for lawyers of moderate means to communicate with the poor and minority communities except through direct mail solicitation?

4. After hearing conflicting evidence, may a district court decide that under *Central Hudson* a State has not justified a barratry statute criminalizing direct mail solicitation within 30 days of an accident, or does *Florida Bar* establish a new burden-of-proof rule that a State's evidence, if *alone* "sufficient," adequately justifies such a criminal statute?

5. After hearing the trial evidence, may a district court decide -- consistently with *Central Hudson* and *Edenfield v. Fane*, 113 S.Ct. 1792 (1993) -- that a State has not justified its criminalization of direct mail solicitation within 30 days of an accident by *physicians, surgeons, chiropractors and other health professionals*, or does *Florida Bar* establish a new "analytical framework" for judicial review of all professional solicitation?

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John Ventura, David O. Chambers, Paul J. Dunham, Steven P. Boney, Adriane Anderson d/b/a Anderson Courier Service, Tim Rusk, Steve Livens, Lois Livens, John G. Heather, and Direct Mail Marketing, Inc., petition for a writ of certiorari to review the opinion and the judgment of the Court of Appeals for the Fifth Judicial Circuit entered in this case on August 23, 1995.

OPINIONS BELOW

The opinion and judgment of the Court of Appeals for the Fifth Circuit (Appendix A, *infra*) is reported as *Moore v. Morales*, 63 F.3d 358 (1995). Its denial of rehearing (Appendix B, *infra*) is reported at 1995 U.S. App. LEXIS 27946. The judgment of the District Court for the Southern District of Texas, Houston Division (Appendix C, *infra*), is not reported. The District Court's opinion and order (Appendix D, *infra*) and its supplemental order (Appendix E *infra*), are reported at 843 F.Supp. 1124 (1994).

JURISDICTION

The opinion of the Court of Appeals for the Fifth Circuit was entered on August 23, 1995. That Court's order denying Petitioners' petition for rehearing was entered on September 18, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254.

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment I:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Amendment XIV:

> Section 1. . . . [N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . .

STATEMENT OF THE CASE

Both *Florida Bar v. Went for It, Inc.*, 115 S.Ct. 2371 (1995), and this case arose while the American Bar Association Commission on Advertising was studying the benefits of lawyer advertising in delivering services to the poor and minority communities and the opposition to lawyer advertising arising primarily from lawyer groups, typically out of anticompetitive motivation. Unlike the summary judgment record in *Florida Bar*, the four-day trial record in this case showed what the Commission on Advertising opined -- in Texas, at least, direct mail is a benefit to the poor and minorities; direct mail is viewed unfavorably by lawyers (particularly competitors), while it is viewed favorably by the poor and minorities; direct mail is the only

economically feasible means for lawyers of moderate means to communicate with potential clients.

Moreover, this case comes to this Court when other sources of legal services for the poor and minority communities are vanishing. For example, the appropriation for the Legal Services Corporation is likely to be $250,000,000.00 for the next fiscal year, *see* H.R. 1806, 104th Cong., 1st Sess., less than last year's revenues of *each* of thirteen national law firms, including Skadden, Arps, Slate, Meagher & Flom at $582,000,000 in revenues.[1] *See* American Lawyer, *The Am Law 100,* p. 22 (July/August 1995). Moreover, the Corporation likely will be unable to represent any poor person to whom any of its employees have given unsolicited advice that the person should obtain counsel. *See* H.R. 1806, *supra*, sec. 6.

Unlike the situation in *Florida Bar*, Texas has a direct and narrow means of regulating direct mail solicitation -- filing of all written solicitations with the State Bar prior to or concurrently with mailing, and review of solicitations by the State Bar under detailed rules of conduct. This informed and deliberate administrative process is more direct and narrow

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[1] The ABA Commission noted that large corporate law firms advertise substantially and successfully. *See* Lawyer Advertising at the

than the means challenged in this lawsuit -- a barratry statute imposing a year in jail for the first letter leading to a conviction and two to ten years in prison for the second letter leading to a conviction.

Should the Court of Appeals' decision go unreversed, soon each State will have a barratry statute criminalizing direct mail solicitation, regardless of the anticompetitive motivation behind its content discrimination, regardless of the difficulties of delivery of legal services to the poor and minority communities, and regardless of the availability of more direct and narrow means of regulating mail solicitation.

1. *The American Bar Association Commission on Lawyer Advertising Report*

   a. *Advertising, Including Direct Mail, is Important to the Delivery of Services to the Poor and Minority Communities*

After two decades of service as a national clearinghouse of information and after "the most comprehensive [study] ever undertaken on the subject" of lawyer advertising, the American Bar Association Commission on Advertising recently issued a unanimous report reiterating the value of advertising, including direct mail solicitation, in enabling people to gain access to

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Crossroads, p.55 (Chicago: American Bar Association, 1995); p.7 *infra*.

affordable legal services. *See* Lawyer Advertising at the Crossroads, p. i (Chicago: American Bar Association, 1995). The report came at an opportune time, a time of decreasing national resources for support of legal services to the poor and minority communities and a time of increasing numbers of law school graduates without a clientele and with modest means of giving notice of their services.

Recounting that bans on advertising have historically had their origins as "a method of trade restriction," *id.*, p. 2, the Commission warned that research advancing "an agenda for or against restrictions on lawyer advertising . . . is subject to misleading results in the data collection design and/or interpretation." *Id.*, p. 3.

Based upon its own research, the Commission found it "clear that advertising is a major factor in the delivery of legal services, especially to the poor." *Id.*, p. 3. Advertising provides answers not just to the problem of learning *who* provides legal services, but to the problem of "determining *when* one need[s] legal services" and the problem of finding *what* those services cost. *Id.*, p. 35 (emphasis added).

The Commission noted that traditional methods of client development could not profitably reach the poor and minority communities, *see id.*, p. 35, thereby depriving them

of answers to these problems. By contrast, advertising is an effective means of reaching these communities and building a client base in them. *See id.*, pp. 35, 38, 41 n. 25.

Not surprisingly, the Commission reported that younger lawyers advertise more than older lawyers and that four out of five lawyers do so "to increase the visibility of the practice and to gain clients." *Id.*, p. 52. Not surprisingly too, 61% of lawyers now advertise, *see id.*, and while advertising still varies substantially from region to region, firms of all sizes and kinds now advertise. *See id.*, pp. 53-55. Even large corporate law firms advertise to develop their client bases, and many corporate firms send direct mail to potential clients for this purpose. *See id.*, p. 55.

b. Consumers, Especially the Poor and Minority Communities, View Advertising Favorably

Drawing from a survey sponsored by the ABA, the Commission noted that "those who are most likely to have received information about lawyers through advertising have a relatively high impression of the legal profession." *See id.*, p. 66. Persons with the most favorable impression of lawyers are Black or Hispanic, women, families with annual incomes of less than $20,000, lower-class or lower-middle

class persons, and 18 to 29 year-olds. *See id.*

Citing other research, the Commission noted that "attorney attitudes toward advertising range from negative to neutral, while consumer attitudes are described as neutral to positive." *See id.*, p. 76. The reason for the positive attitude of consumers is "because they are better able to make decisions about who to select for legal services." *See id.*, p. 77.

The Commission noted that while advertising is impersonal, "those finding lawyers in these impersonal ways now are mostly [from the] minority and low income population who had difficulty finding a lawyer at all 20 years ago." *Id.*, p. 92. The Commission concluded that "advertising is a viable vehicle to enable low income families to find legal representation." *See id.*, p. 97. "The importance of this finding cannot be ignored as the organized bar continues to pursue its goal of improved access to all persons regardless of their income." *Id.*

Contrary to the beliefs of some lawyers, the Commission found also that lawyer advertising is not a significant factor, indeed hardly a perceptible factor, in the public's declining perception of lawyers. *See id.*, pp. 71 *et seq.*

2. *Texas' Narrow Means of Regulating Direct Mail: The State Bar May Review All Direct Mail Prior to or Concurrently with Mailing*

In Texas, as elsewhere in the United States, lawyers (and other professionals) send direct mail to increase the visibility of their practices and to develop a clientele. As discussed below, direct mail is vital for communicating the availability of legal services to the poor and minority communities in the State. *See* pp. 12-14 *infra*.

Texas has a narrow means of regulating direct mail, means that protect access to legal services while promoting professionalism and protecting privacy. The Texas Disciplinary Rules of Professional Conduct provide that all advertising, including mail solicitation, must be submitted to the Lawyer Advertisement and Solicitation Review Committee of the State Bar prior to or concurrently with the dissemination of the advertisement. *See* Rule 7.07, Texas Bar Journal, vol. 58, no. 6, p. 436 (June 1995). The Committee reviews advertising for "coercion, duress, fraud,

overreaching, intimidation, undue influence, or harassment." Rule 7.05, *id.*, p. 434. The Committee reviews direct mail solicitation for form and content, including both the communication itself and the envelope. *See* Rule 7.05(b).[2]

3. Texas' Barratry Statute Imposes a 30-Day Ban Upon Written Solicitation by Person Injury Lawyers and Favors In-Person Communications by Insurance Company Adjusters and Lawyers

Texas' other means of regulating direct mail is a criminal barratry statute, *see* Texas Penal Code, Section 38.12(d)(1), (2)(A), which makes an offense any written communication by a lawyer, physician, surgeon, chiropractor or health care professional to a victim of any accident or disaster (or the victim's relative) within 30 days of an accident or disaster.[3] The Barratry Statute makes the first letter resulting in a conviction a misdemeanor punishable by

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[2] The envelope must be "plainly marked" "ADVERTISEMENT." Rule 7.05(b)(2).

[3] If the victim is involved in a vehicular accident, the professionals identified above may send a written communication if the victim has so indicated by a "check-off" on the police accident report form. Were it not for several infirmities, this "check-off" might provide a second narrow means, short of a barratry conviction, to promote professionalism. However, the victim is given no choice on the form whether to receive communications from doctors, for example, but not from lawyers; no choice whether to receive communications (written or in-person) from insurance company adjusters and lawyers. Moreover, there is no provision for citizen choice in non-vehicular accidents and disasters.

a year in jail and makes the second letter resulting in a conviction a felony punishable by a minimum of two years and a maximum of ten years in prison. *See* Texas Penal Code, Sections 12.21; 12.34; 38.12(g), (h) (1994). The Barratry Statute concededly promotes professionalism and protects privacy but, given enforcement of the State Bar regulation, the Barratry Statute furthers State interests severely.

4. This Lawsuit

Petitioners are licensed attorneys who provide professional services to civil plaintiffs and who offer their services to prospective plaintiffs by mailing written solicitations to persons involved in motor vehicle accidents. Petitioner Direct Mail Marketing, Inc., is a company that, pursuant to the Texas Public Information Act, obtains copies of motor vehicle accident reports from public agencies, and that for a fee provide copies of public records to attorneys and health care professionals.

Petitioners' lawsuit challenged the constitutionality of the Barratry Statute provision criminalizing direct mail solicitation of motor vehicle accident victims, as well as a provision of the Texas Uniform Act Regulating Traffic on

the Highway, V.T.S.A. Article 6701d, Section 47(a), (c), prohibiting petitioners from gaining access to accident reports for 180 days.[4] Both provisions affirmatively allow insurance company adjusters and lawyers to communicate with accident victims from the start by approaching them in person in hospitals or at home and by getting their accident reports immediately from public agencies.

Petitioners showed that direct mail is a necessity in Texas for poor and minority victims to gain access to legal services,[5] both because lawyers of moderate means cannot cost-effectively communicate by any other means and because poor and minority victims, short of personal contacts, cannot otherwise learn intelligently about their need for legal services and the cost of such services. Petitioners showed, too, that a 30-day ban on direct mail is a boon for

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[4] The District Court declared unconstitutional the Uniform Traffic Act provision restricting access to accident reports for 180 days, and Respondent did not appeal the decision.

[5] The legislative scheme, of which the 30-day ban on written solicitations by personal injury lawyers and health professionals is a part, includes a 30-day ban on written solicitations by defense attorneys in criminal cases and in civil cases such as divorce. The District Court declared these bans unconstitutional, too, and Respondent did not appeal the decision. Taken together, these 30-day bans would have posed a wide barrier to access to non-governmentally-supported legal services for the poor and minority communities.

insurance adjusters and lawyers to gain singular access to accident victims and achieve control (sometimes, complete control) of evidence.

a. Poor and Minority Texans Want and Need Direct Mail; It is the Only Viable Means for Attorneys of Moderate Means to Reach Poor and Minority Texans

Petitioners presented the testimony of Mr. Miguel Solis, a Mexican-American lawyer practicing in Texas. Mr. Solis said he "was starving" when he first started practicing. *See* R. 16, p. 153. He tried television advertising, but it was "a lot of money" with "absolutely no response." *Id.* Mr. Solis began then to mail written solicitations to Hispanic and Black prospective clients and found the means "very effective" and the response "very positive." *See id.*, pp. 151-152.

Mr. Solis said that the Hispanic clients he represented were "scared" and had "a hard time communicating with other [kinds of] people." *Id.*, p. 152. In the several years he used direct mail, Mr. Solis received "maybe one or two complaints" and got "at least one or two clients a week." *Id.*, p. 154.

Petitioners presented the testimony of Ms. Doneil

Renee Pete, an African-American nursing student attending school in Houston, Texas. Ms. Pete testified that after an accident, she received five or six written solicitations from lawyers. *See* R. 17, p. 68. The letters, she testified, provided her information, especially about litigation costs, and helped her decide which lawyer to hire. *See id.* She found direct mail letters more helpful to her than television advertising or other advertising methods. *See id.*, pp. 69-70.

b. Texas Insurance Companies Are Free to Use the First Weeks After an Accident to Extract Settlements and Remove Evidence

Mr. Stephen Mitchell, a lawyer who did both insurance defense and plaintiffs' personal injury cases, testified that in motor vehicle collisions incidents, "insurance adjusters will ask the injured to bring their motor vehicles in for an inspection or adjustment. Therefore, frequently the motor vehicles itself will disappear within two weeks of the collision to be repaired or to go into a salvage yard somewhere." R. 16, p. 112. Further, Mr. Mitchell testified that within thirty-one days of a collision,

> [Insurance adjusters will] want to take statements of the injured. By "statements" I mean recorded statements that will come back to be used again. I've read thousands of these statements, the adjuster will attempt to mold and color the testimony

most favorably to the adjuster's position. Also, the adjuster will take witness statements again doing the same molding and colorization of testimony.

Finally, the adjuster will ask the individual who's injured to sign a medical authorization. Now, obviously medical authorizations are allowed under the State Rules of Civil Procedure, but the authorizations that carriers try to have the individuals sign do not comport with Rule [166(b)(2)] of the Texas Rules of Civil Procedure because the carrier is going to have the individual sign an authorization which will allow the carrier to discover the entire panoply of the injured person's medical records where under the rule they're only entitled to discover those records that reasonably relate to the injuries or damages asserted in this cause of action. R. 16, p. 123.

Respondent's witnesses testified about the practices of insurance company adjusters, too. Mr. George Miller, whose son was killed in an automobile accident, testified that a representative of the other driver's insurance company came to the intensive care unit of the hospital to which his son was brought after the accident, and she also telephoned Mr. Miller at home "wanting to move forward with trying to settle the claim." R. 17, p. 126; *see id.*, pp. 124-27. Ms. Joanne Lykins, whose husband was killed in an automobile accident, testified that a representative of the other driver's insurance company showed up at her home, and "he just wanted to like hand me a check and say good-bye." R. 17,

pp. 169-70. Moreover, he tried to convince Ms. Lykins to forego a lawsuit, because she would be "'better off living the rest of [her] life on workmen's comp.'" *Id.*, p. 170.

c. The Barratry Statute's Ban on Written Solicitation by Personal Injury Lawyers Was Drafted by Competitors Opposed to Any Advertising as a Means of Accident Victims' Accessing Legal Services

The Barratry Statute's bans on written solicitation, and the companion restriction on access to accident report forms, were drafted by competitors opposed to advertising by personal injury lawyers. The Barratry Statute was drafted by an officer of the Texas Trial Lawyers Association and others opposed to any form of lawyer advertising. *See* Colloquy, R. 16, pp. 229-30; Testimony of Mr. McCormack, R. 18, pp. 92-94; Testimony of Mr. Edwards, R. 19, pp. 62-63. The same officer of the Texas Trial Lawyers Association (a private attorney) represented Respondent (a public official) at trial, *see* R. 16, p. 6, in defense of the statute of which the private attorney was a drafter.

The companion statute was drafted by a State representative who is a lawyer and who testified that his competitors had sent direct mail to clients he considered his alone. *See* Testimony of Rep. Goodman, R. 19, p. 99. In

drafting the restriction on obtaining accident reports, the State representative testified that his intent was to make accident report forms without value to personal injury attorneys, if he could not make them totally unavailable, for the purpose of written solicitation. *See id.*, R. 19, p. 107. But he intended to make the forms available to others, including insurance adjusters and lawyers, without restriction. *See id.*, R. 19, pp. 117-18.

5. The District Court's Findings and Judgment

After four days of trial, hearing testimony from twenty-one witnesses and receiving 54 exhibits, the District Court entered an Order pursuant to F.R.Civ.P. 52, making findings of fact and conclusions of law on the constitutionality under the First Amendment of Texas' 30-day bans on mailing written communications and 180-day restriction on access to accident record forms.

Applying *Central Hudson Gas & Elec. Corp. v. Public Service Comm'n of New York*, 447 U.S. 557 (1980), the District Court found that Respondent failed to meet his burden of proving that the mailing of written solicitations causes "real harm" to the interests articulated at trial; or that the 30-day bans and the restriction "directly advance" those articulated interests. *See* Appendix D, pp. 20a-25a.

Applying *City of Cincinnati v. Discovery Network, Inc.*, 113 S.Ct. 1505 (1993), the District Court found that the bans discriminated upon the basis of content and that Respondent did not justify treating the messages of lawyers, physicians, surgeons, chiropractors and other health professionals differently from the messages of insurance companies. *See* Appendix D, pp. 25a-26a.

6. The Court of Appeals' Judgment

The Court of Appeals reviewed the judgment of the District Court *de novo* and concluded, without making specific findings of fact and conclusions of law, that Respondent's evidence was "sufficient" under *Central Hudson*. *See* Appendix A, p 8a. The Court held, moreover, that Petitioners' claim of content discrimination was not subject to review under *City of Cincinnati v. Discovery Network, Inc., supra*, but only under *Central Hudson*. *See id.*, p. 6a n.4.

The Court of Appeals held that even if Texas had narrower means of furthering its articulated interests, nonetheless the Barratry Statute survived scrutiny, because the State need not choose the narrowest means. *See id.*, p. 8a.

Finally, the Court reversed and remanded the District Court's application of *Central Hudson* to physicians, surgeons, chiropractors and other health professionals, because *Florida Bar v. Went for It, Inc.*, 115 S.Ct. 2371 (1995), established a "new analytical framework" for reviewing 30-day bans applied to these professionals. *See id.*, p. 9a-10a.

REASONS FOR GRANTING THE WRIT

1. There is a substantial conflict in the Circuits whether the standard of review articulated in *Bose Corp. v. Consumers Union of the United States, Inc.*, 466 U.S. 485 (1984), allows a court of appeals to review *de novo,* rather than under the clearly erroneous standard, the findings of a trial court striking down State statutes as violating the First Amendment.

Three Circuits have held that *Bose Corp.* does not permit *de novo* review. *See Multimedia Publishing Co. of South Carolina v. Greenville-Spartanburg Airport District*, 991 F.2d 154, 160 (4th Cir. 1993); *Daily Herald Co. v. Munro*, 838 F.2d 380, 383 (9th Cir. 1988); and *Planned Parenthood Assn./Chicago Area v. Chicago Transit Authority*, 767 F.2d 1225, 1228-29 (7th Cir. 1985).

Two Circuits, including the court below, have held that *Bose Corp.* permits *de novo* review. *See Don's Porta Signs, Inc. v. City of Clearwater*, 829 F.2d 1051, 1053 n. 9 (11th Cir. 1987), *cert. denied*, 485 U.S. 981 (1988)(White J., dissenting, with opinion); *Lindsay v. City of San Antonio*, 821 F.2d 1103, 1107 (5th Cir. 1987), *cert. denied,* 484 U.S. 1010 (1988). Relying upon *Lindsay* and upon a death penalty opinion, *Lockhart v. McCree*, 476 U.S. 162, 168 n. 3 (1986), the Court of Appeals below decided to review *de novo*.

A statutory court must exercise review in accordance with its statutory and rules-based authority, unless the Constitution provides otherwise. Rule 52(a) plainly states that review must be by the clearly erroneous standard. Had the Court of Appeals followed that review, Petitioners would have prevailed.

The First Amendment does not authorize *de novo* review of a loss by the government in a speech case. It turns the First Amendment on its head to review closely where the government loses, that is, in cases where the government seeks to suppress speech. As Judge Phillips aptly said in *Multimedia Publishing Co. of South Carolina, supra,* 991 F.2d at 160:

> The *Bose* requirement of independent review doesn't apply to the [government's] claim that it has been wrongly prevented from restricting speech. [Citations omitted.] The requirement is rested upon "special solicitude for claims that the protections afforded by the First Amendment have been unduly *abridged*," [citing *Planned Parenthood, supra*, 767 F.2d at 1229 (emphasis added)], requiring appellate courts "to make an independent examination of the whole record *in order to make sure that 'the judgment does not constitute a forbidden intrusion on the fields of free expression.'*" *Bose*, 466 U.S. [485,] at 499 (emphasis added)(quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 285 (1964)).

But if this Court disagrees and decides that a court of appeals is empowered to review *de novo*, then the independent review must result in articulated findings of fact and conclusions of law. Protection of Plaintiffs' First Amendment rights of speech require that a court of appeals not undercut a trial court's careful scrutiny by an ambiguous and generalized review, as did the Court of Appeals below.

And even did the First Amendment not require such, both fundamental fairness and the proper functioning of the federal court system do. It is unfair to Plaintiffs for an appellate court to disregard careful findings made after a four-day trial without equally careful findings in disagreement. Moreover, the failure to make careful findings provides no direction to trial courts within the

circuit and no basis for review and control by this Court.

Petitioners submit, therefore, that the exercise of *de novo* review in the Fifth and Eleventh Circuits, in appeals from a governmental loss, are without lawful authority.

2. With due respect to the Court of Appeals' opinion, this Court did not explicitly address, let alone preclude, claims of content discrimination in *Florida Bar*. Nonetheless, there is a substantial conflict in the Circuits about whether *Central Hudson* governs such claims.

Unlike *Florida Bar*, where content-discrimination and competitor-favoritism were perhaps surmises, Petitioners claimed, and the District Court found, that the Texas statutory provisions challenged in this case (which included a 30-day ban) were designed to disfavor speech by the Petitioner attorneys and other professionals and to favor speech by insurance companies and their adjusters and attorneys. *See* Appendix D, pp. 25a-27a. The District Court's findings and conclusions provided independent support for its judgment for Petitioners.

Petitioners' evidence showed that the Barratry Statute was enacted as part of a statutory initiative designed to give insurance company adjusters and lawyers the opportunity to

speak with accident victims free of interference by personal injury lawyers and other professionals. The evidence showed that insurance company adjusters take advantage of the first days after an accident to secure a quick settlement and to alter the condition of any automobile damaged in an accident.

Further, the evidence showed that the poor and racial minorities in Texas are pleased with direct mail solicitation and that opposition comes chiefly from competing lawyers. This accords with the recent findings of the American Bar Association Commission on Advertising's report, Lawyer Advertising at the Crossroads, ch. 6 (Chicago: ABA, 1995); pp. 5-8 *supra*. The evidence showed that direct mail solicitation, in Texas at least, is an important means of providing access to lawyer services for the poor and minorities.

Petitioners' proof notwithstanding, the Court of Appeals refused to consider a content-based claim. It opined that "[f]or content-based commercial speech restrictions of this type, *Florida Bar* holds that the *Central Hudson* test is the applicable standard." *See* Appendix A, p. 6a n.4, citing *Central Hudson Gas & Elec. Corp. v. Public Service Comm'n of New York*, 447 U.S. 557 (1980). The Court of

Appeals' holding conflicts with *City of Cincinnati v. Discovery Network, Inc.*, 113 S. Ct. 1505 (1993), and with the majority of the Circuits.

The Ninth Circuit appears to share the Fifth Circuit's view. *See Assn. of National Advertisers, Inc. v. Lungren*, 44 F.3d 726, 729-30 (1994). Other Circuits review content-discrimination and *Central Hudson* claims separately. *See, e.g., National Amusements, Inc. v. Town of Denham*, 43 F.3d 731 (1st Cir. 1995); *The Chesapeake & Potomac Tel. Co. Va. v. United States*, 42 F.3d 181 (4th Cir. 1994), *cert. granted*, 1995 U.S. LEXIS 4273 (U.S., June 26, 1995); *Gold Coast Publications, Inc. v. Corrigan*, 42 F.3d 1336 (11th Cir. 1994).

It is fundamentally wrong to abandon content-based review where there is a substantial claim of a design to remove disfavored speech from the marketplace, even where the contest is between competing commercial messages. To do so allows powerful vested interests not only to wield their economic power free of the restraints of their competitors, but to do so with the aegis of government-sponsored censorship.

Victims of accidents entering quick and imprudent settlements, are injured thereby. The poor and minorities,

who favor receipt of direct mail and who use it for access to services, are injured thereby. Lawyers seeking to enter the marketplace, especially young lawyers, and lawyers already in the marketplace seeking to remain competitive, are injured thereby. *See* Appendix D, p. 28a. And a First Amendment value, that government should not take sides in a contest about access to remedies, is injured thereby, too.

3. *Florida Bar* does not sustain every 30-day ban on direct mail solicitation. This Court did not address a ban where a State has in place a narrower, better-fitting means of promoting professionalism and protecting privacy. This Court did not address a ban where the poor and minorities, as well as lawyers of moderate means, rely upon direct mail as a primary means of access to legal services. To turn *Florida Bar* into a *per se* rule, as did the Court of Appeals, eviscerates mid-level scrutiny.

Unlike *Florida Bar*, where narrow, better-fitting means were mere surmises, Texas *has*, and the District Court was aware of, a narrower, better-fitting means of promoting professionalism and protecting privacy than a wholesale 30-day ban on direct mail solicitation. The District Court took notice of the fact that the State Bar of Texas, and later the Texas Supreme Court, had before them amendments to the

Texas Disciplinary Rules of Professional Conduct, whereby all advertising (including mail solicitation) must be submitted to the Lawyer Advertisement and Solicitation Review Committee of the State Bar for review prior to or concurrently with the solicitation. *See* Rule 7.07, Texas Bar Journal, vol. 58, no. 6, p. 436 (June 1995). This rule constitutes a direct and efficient protection of professionalism and privacy.

The Court of Appeals refused to consider this narrower, better-fitting means, holding that "as noted in *Florida Bar*, the State is not required to employ the least restrictive means in promoting its interest." Appendix A, p. 8a. This holding is in conflict with the jurisprudence developed in the case law from *Central Hudson* through *Florida Bar*.

Florida Bar acknowledged that a court should consider the existence of less-burdensome alternatives, at least as a factor. *See* 115 S.Ct. at 2380. *Florida Bar* did not mean to establish a hard-and-fast rule that a 30-day ban will always be a sustainable means of furthering professionalism and privacy.

In *Florida Bar* (here, from a summary judgment), this Court did not establish that a 30-day ban fits States of all

sizes and populations, all conditions of delivery of services, and all traditions of professional regulation. Following a four-day trial, the District Court held in effect that Texas' situation was different than Florida's. This Court did not mean to prevent that result.

4. The Court of Appeals' opinion is in conflict also with *Edenfield v. Fane*, 113 S.Ct. 1792 (1993), which recognized the First Amendment rights of professionals other than lawyers to solicit clients in person. The Court of Appeals remanded the case to the District Court with instructions to review under the "analytical framework" of *Florida Bar* whether physicians, surgeons, chiropractors and other health professionals may send direct mail within 30 days of an accident. *See* Appendix A, p. 8a-9a.

Petitioners submit that the Court of Appeals' opinion erects another significant barrier for the poor and minorities, in this instance, in obtaining access to medical services.[6]

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[6] The Court of Appeals was dubious about Petitioners' standing to raise claims on behalf of physicians, surgeons, chiropractors and other health professionals. *See* Appendix A, pp. 8a-9a. With due respect, Petitioner Direct Mail Marketing, Inc., provides direct mail services to chiropractors and health professionals and, as a result, has standing under *Craig v. Boren*, 429 U.S. 190 (1976).

CONCLUSION

The opinion of the Court of Appeals represents a decided setback to efforts to achieve access to legal, as well as medical services, to the poor and minority communities at a time when national resources for such access are being decreased and at a time when law graduates are eager to provide such services. The petition for a writ of certiorari should be granted.

Respectfully Submitted,

s/Neil H. Cogan

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APPENDIX A

MOORE, et al. v. MORALES, et al.
No. 94-20138

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

1995 U.S. App. LEXIS 23929

August 23, 1995, Decided

Appeal from the United States District Court for the Southern District of Texas (CA-H-93-2170, c/w 93-2499, 93-2699, 93-2700 & 93-2701)

Before POLITZ, Chief Judge, REAVLEY and BARKSDALE, Circuit Judges.

OPINION BY: RHESA HAWKINS BARKSDALE, Circuit Judge:

At issue is the constitutionality of Texas' prohibiting several groups ("attorneys, chiropractors, physicians, surgeons, or private investigators licensed to practice in this state or any person licensed, certified, or registered by a health care regulatory agency of this state"), Tex. Penal Code §38.12(b)(1) (1994), from direct mail solicitation to accident victims or their families within 30 days after the accident. In view of the Supreme Court's very recent holding in *Florida Bar v. Went For It, Inc.*, 132 L. Ed. 2d 541, 115 S. Ct. 2371 (1995), we hold that, as to attorneys, it is constitutional, and REVERSE; but, as to the other groups, we REMAND for further proceedings.

I.

In 1993 the Texas legislature attempted, for the second time, to limit the solicitation efforts of several groups: "attorneys, chiropractors, physicians, surgeons, or private investigators licensed to practice in this state or any person licensed, certified, or registered by a health care regulatory agency of this state". Tex. Penal Code §38.12(b)(1) (1994).[1] Among other things, the 1993 provisions (1) prevented those groups from direct mail solicitation to accident victims or their families until the 31st day after the day of the accident (the 30-day ban); (2) restricted access to accident reports for 180 days following the accident; and (3) prevented direct mail solicitation of criminal and civil defendants until the 31st day following the initiation of legal proceedings. (The 1993 provisions also provided a means whereby an accident report may indicate a victim's desire to not receive solicitation letters, and prohibited solicitation of individuals so indicating. The district court's order did not address these provisions.)

Five actions, which were consolidated, challenged the 1993 provisions as unconstitutional under the First and Fourteenth Amendments. The district court temporarily enjoined enforcement of the provisions, and, following an expedited bench trial, found them to be an unconstitutional hindrance of commercial speech.

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[1] Texas' first attempt to limit solicitation, which consisted of a complete prohibition on the use of crime or accident reports for the purpose of soliciting clients, was held by our court to be "too broad a means of effectuating the intended purpose of the law". Innovative Database Sys. v. Morales, 990 F.2d 217, 222 (5th Cir. 1993).

II.

At issue is only one of the 1993 provisions: the 30-day ban on solicitation of accident victims and their families. See Tex. Penal Code §38.12(d)(2)(A) (1994).

A.

First we reject the suggestion that the Texas Attorney General lacks standing to maintain this appeal in his name for the State of Texas. The Attorney General was a named party in three of the five consolidated cases. Moreover, by statute, the State of Texas requires that, when the constitutionality of one of its laws is challenged, "the attorney general of the state must also be served with a copy of the proceeding and is entitled to be heard". Tex. Civ. Prac. & Rem. Code §37.006(b); see also *Baker v. Wade*, 743 F.2d 236, 242 (5th Cir. 1984) (holding that Texas Attorney General is presumptively adequate representative of State's interest when constitutionality of Texas law is challenged), rev'd on other grounds, 769 F.2d 289 (5th Cir. 1985).[2]

B.

The direct mail solicitation that Texas seeks to regulate is a form of commercial speech protected by the First Amendment.[3] Therefore, pursuant to the Supreme

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[2] Appellees' contention springs, in large part, from the claim that the Attorney General has "no enforcement or other official authority" under the challenged statutes. They rely on *League of United Latin Am. Citizens v. Clements*, 999 F.2d 831 (5th Cir. 1993), cert. denied, 127 L. Ed. 2d 74, 114 S. Ct. 878 (1994) where our en banc court addressed the limitations on the power of the Texas Attorney General to settle a matter against the will of the state officials he was charged to represent. *Id.* at 840-43. *Clements* does not support the notion that the Attorney General cannot appeal the district court's judgment.

[3] Commercial speech that is false or misleading, however, is not entitled to such protection. *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 563-64, 65 L. Ed. 2d 341, 100 S. Ct. 2343

Court's very recent holding in *Florida Bar v. Went For It, Inc.*, 132 L. Ed. 2d 541, 115 S. Ct. 2371 (1995), the 30-day ban, in order to withstand constitutional scrutiny, must satisfy the three-prong test of *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 564-65, 65 L. Ed. 2d 341, 100 S. Ct. 2343 (1980): (1) the State must assert a substantial interest supporting the regulation; (2) the regulation must directly and materially advance that interest; and (3) the regulation must be narrowly drawn to advance that interest. Prior to Florida Bar being rendered, the district court held that Texas' 30-day ban failed each prong of this inquiry. We first address the 30-day ban as to attorneys, then turn to the other affected groups.

Along this line, Appellees insist that we review only for clear error, pursuant to Fed. R. Civ. P. 52. But, as the district court's opinion illustrates, findings of fact in the constitutional free speech context are frequently informed by the relevant legal landscape; questions of law and fact are easily intertwined.

Although a district court's findings of fact are normally reviewed under the clearly erroneous standard, our court recognizes the distinctive nature of fact-finding with respect to the constitutionality of commercial speech regulations. *E.g., Lindsay v. City of San Antonio*, 821 F.2d 1103, 1107 (5th Cir. 1987), *cert. denied*, 484 U.S. 1010, 98 L. Ed. 2d 658, 108 S. Ct. 707 (1988); *Dunagin v. City of Oxford*, 718 F.2d 738, 748 n.8 (5th Cir. 1983), *cert. denied*,

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(1980). The State concedes that, with the exception of Innovative Database Systems (IDS) and the National Association of Accident and Injury Victims (NAAIV), Appellees' commercial speech is not false or misleading. In this connection, the State has urged that, even if the 30-day ban is unconstitutional as to the other Appellees, IDS and NAAIV are not entitled to that protection because they engage in false and misleading speech. As discussed in part II.B.2., we do not reach this question.

467 U.S. 1259, 82 L. Ed. 2d 855, 104 S. Ct. 3553, 104 S. Ct. 3554 (1984). *See Lockhart v. McCree*, 476 U.S. 162, 168 n.3, 90 L. Ed. 2d 137, 106 S. Ct. 1758 (1986). We review *de novo*.

1.

Needless to say, as to attorneys, Florida Bar controls. At issue was a Florida Bar rule imposing a 30-day ban on the solicitation of accident victims and their families -- a regulation nearly identical to the one in issue. 115 S. Ct. at 2374. Applying the three-prong *Central Hudson* test, the Court held that the rule was constitutional. Id. at 2376-81.

For the substantial interest prong, the Florida Bar offered, inter alia, its interest in "protecting the privacy and tranquility of personal injury victims and their loved ones against intrusive, unsolicited contact by lawyers". Id. at 2375. The Court had "little trouble crediting [this] interest as substantial", noting that its prior precedent has "consistently recognized that 'the State's interest in protecting the well-being, tranquility, and privacy of the home is certainly of the highest order in a free and civilized society'". *Id. at* 2376. (quoting *Carey v. Brown*, 447 U.S. 455, 471, 65 L. Ed. 2d 263, 100 S. Ct. 2286 (1980)). The Court also noted that "a single substantial interest is sufficient to satisfy Central Hudson's first prong". *Id. at* n.1.

For the second prong, requiring proof that the regulations directly and materially advance the State's interest, the Court was persuaded that "the Florida public views direct-mail solicitations in the immediate wake of accidents as an intrusion on privacy that reflects poorly upon the profession". 115 S. Ct. at 2376. Distinguishing [*8] prior precedent, the Court seized on the specific harm the Florida Bar sought to eliminate: the invasion of privacy and

accompanying "outrage and irritation" associated with direct mail advertising to recent accident victims and their families. *See id.* at 2377-79. Finding the scope and nature of the interest presented by the Florida Bar distinct from the claims made in prior cases before it, the Court concluded that the second prong of *Central Hudson* was satisfied. *Id. at* 2378-79.

Turning to the third, and final, prong, the Court noted that the government need not employ the "least restrictive means" to further its interest. *Id. at* 2379. Instead, that prong requires only that the regulation's restrictions reasonably fit the desired objective. Id. That settled, the Court concluded that the Florida Bar rule was "reasonably well-tailored to its stated objective of eliminating targeted mailings whose type and timing are a source of distress to Floridians". *Id.*

Texas, like the Florida Bar, has advanced the interest of protecting the privacy of accident victims and their families. Indeed, in almost all respects, Texas' position supporting the 30-day ban as to attorneys essentially mirrors that of Florida Bar. Nonetheless, Appellees maintain there are significant distinctions, permitting us to affirm the district court's holding that Texas' 30-day ban is unconstitutional.[4]

Principally, Appellees contend that, unlike the record in *Florida Bar*, the record developed by Texas cannot support finding that its interests are substantial, or that its 30-

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[4] Appellees assert that *Florida Bar* has no impact on this case, maintaining that it did not involve a claim that the 30-day ban constituted a content-based, discriminatory regulation. For example, they claim that Texas' 30-day ban favors the speech of insurance companies, to the detriment of attorneys and health care professionals. This contention misses the mark. For content-based commercial speech restrictions of this type, *Florida Bar* holds that the *Central Hudson* test is the applicable standard.

day ban directly advances them. We disagree. *Florida Bar* does not require an overwhelming record in support of the 30-day ban. Rather, it echoed prior precedent requiring only that there be more than "mere speculation and conjecture", and that "a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree". *Florida Bar*, 115 S. Ct. at 2376. Informing our analysis of the sufficiency of the record is the Court's observance in *Florida Bar* that, in *Edenfield v. Fane*, 123 L. Ed. 2d 543, 113 S. Ct. 1792, 1801 (1993), where the Court struck down a regulation on commercial speech because of an inadequate record, there was "no evidence" in support of the regulation. 115 S. Ct. at 2378. The Court readily distinguished *Florida Bar* from *Edenfield*; we do the same here.

Before us is extensive evidence of the great number of complaints associated with direct mail solicitation in general. As to such solicitation within 30-days of an accident, experts for the State testified that it can be detrimental to an accident victim and his or her family. They testified further that the 30-day ban would provide reasonable protection from many of these detrimental effects.

There is also testimony from individuals that their receipt of direct mail solicitation immediately following an accident outraged them, invaded their privacy, and contributed to their emotional distress. Those same individuals testified that they would have been better able to cope with the intrusiveness of the solicitation letters had they not received them until at least one month after the accident. The State's evidence was further supported by the co-chairman of the Houston Trial Lawyers' Association and the author of the 1993 provisions; both testified to numerous complaints of outrage and invasion of privacy regarding

direct mail solicitation. Based on *Florida Bar*, we find this evidence sufficient to satisfy the first two Central Hudson prongs: Texas' stated interest in protecting its citizens from the invasion of privacy is substantial; solicitation within 30 days of an accident creates, among other things, an invasion of privacy; and the 30-day ban substantially alleviates this invasion.

Appellees next turn to the third prong of *Central Hudson*, requiring a "fit" between the ends and means of the 30-day ban. They note that Texas now has a system whereby accident victims may indicate, on the accident report, their desire not to be contacted through direct mail solicitation. Accordingly, Appellees claim the 30-day ban is more than is necessary to prevent unwanted contact from attorneys. This argument fails on two counts – one factual, one legal.

As the State's evidence illustrates, often it is the accident victim's family, not the victim, that the 30-day ban seeks to protect. And, needless to say, when the victim dies, or is otherwise unable to sign or understand an accident report, the protection against unwanted solicitation is of no avail. In any event, as noted in *Florida Bar*, the State is not required to employ the least restrictive means in promoting its interest. 115 S. Ct. at 2380. Again, based on *Florida Bar* and its similarity to this case, we conclude that, as to attorneys, Texas' 30-day ban, like the Florida bar rule, passes the third, and final, prong of the commercial speech constitutional inquiry.

2.

Finally, on behalf of the other licensed groups covered by the statute, including, but not limited to physicians, surgeons, chiropractors, and private investigators, Appellees seek to challenge the 30-day ban. But, almost the entire thrust of the case concerned the ban as

to attorneys. And, most interestingly, the other groups have not challenged the ban.[5] Even assuming Appellees have third-party standing to assert this claim, see, e.g., *Secretary of State of Md. v. Joseph H. Munson Co.*, 467 U.S. 947, 954-59, 81 L. Ed. 2d 786, 104 S. Ct. 2839 (1984), the validity of the ban as to the other groups, even if raised sufficiently in the district court, was far from sufficiently developed, especially in light of the new guidance from *Florida Bar*.[6] We, therefore, will not consider it now.

III.

For the foregoing reasons, the judgment of the district court is **REVERSED** in part, and the case is **REMANDED** with instructions to vacate the injunction as to the 30-day ban, and to enter judgment upholding the ban as to attorneys.

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[5] For example, it appears that the Texas medical and chiropractic associations supported the bill. One of the Appellees, NAAIV, is made up entirely of chiropractors. However, it appears from the pretrial order that NAAIV's challenge was based only on the 1993 provisions that limited access to accident reports. In any event, the district court's opinion addressed the NAAIV only with respect to whether it engaged in "misleading or deceptive communication", and whether the 1993 provisions reasonably protect against that type of communication. It is, therefore, difficult to determine in what capacity, and on who's behalf, NAAIV appears.

[6] The district court's opinion focused almost exclusively on the evidence relating to attorney solicitation. It did not discuss the evidence, or lack thereof, concerning solicitation by the other groups. Likewise, it is unclear whether Appellees contended that the 30-day ban, whether constitutional or not as to attorneys, was unconstitutional as to the other groups. For example, no physician, surgeon or investigator testified; only one chiropractor did, and very little of his testimony concerned the 30-day ban. On the other hand, and as another example, there was testimony by the author of the bill that his constituents resented post-accident letters from attorneys and chiropractors. Now that *Florida Bar* has directed the fate of the 30-day ban as to attorneys, and has delineated the analytical framework, the district court may consider this under-developed, if not undeveloped, issue.

As to the other groups affected by the 30-day ban, this case is **REMANDED** for further proceedings consistent with this opinion and Florida Bar. Such proceedings should include the issue of standing in this case by those other groups.

REVERSED AND REMANDED

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

#94-20138

Mary Moore, et al.,
Plaintiffs- Appellees,

versus

Dan Morales, Attorney General,
Defendant-Appellant.

Appeal from the United States District Court for the
Southern District of Texas

ON PETITION FOR REHEARING

(September 18, 1995)

Before POLITZ, Chief Judge, REAVLEY and BARKSDALE, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above case is DENIED.

ENTERED FOR THE COURT:

s/ Rhesa H. Barksdale
United States Circuit Judge

APPENDIX C

MOORE, et al., v. MORALES, et al.
CIVIL ACTION NO. H-93-2170

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

FINAL JUDGMENT

As the Court has previously granted plaintiffs' Motions for Preliminary and Permanent Injunction in the above referenced cause, in an order entered on January 19, 1994 and supplemental order entered January 20. 1994, the Court hereby

ORDERS that judgment be entered in favor of plaintiffs Mary Moore, et al.

This is a Final Judgment.

Signed at Houston, Texas, on this 27th day of January, 1994.

DAVID HITTNER

s/ David Hittner
United States District Judge

APPENDIX D

MOORE, et al., v. MORALES, et al.
CIVIL ACTION NO. H-93-2170

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

843 F. Supp. 1124; 1994 U.S. Dist. LEXIS 364

January 19, 1994, Decided
January 19, 1994, Filed

OPINION: ORDER

Pending before the Court are the Motions for Preliminary and Permanent Injunction filed by plaintiffs in the above referenced cause. Having considered the motions, the submissions, and the testimony presented in a trial on the merits conducted by the Court on November 8 through 12, 1993, the Court determines that the motions should be granted.

Plaintiffs include various commercial entities that obtain accident reports and criminal offense reports from public agencies, such as police departments and the Texas Department of Public Safety, and disseminate that information for a fee. Plaintiffs also include licensed attorneys practicing in the State of Texas who utilize accident and criminal offense reports to solicit clients through direct mail advertising. Plaintiffs brought this action seeking a permanent injunction against enforcement of recent amendments to section 38 of the Texas Penal Code ("the Barratry Statute") and to the Texas Uniform Act Regulating Traffic on Highways ("the Uniform Traffic Act").

Specifically, plaintiffs contend enforcement of TEX. PENAL CODE ANN. §§38.12(d)(2)(A), (B), (C), & (D) and 38.12(e), and TEX. REV.CIV. STAT. ANN. art. 6701d §47(a),(b),(c),(f), all effective September 1, 1993, would violate their constitutional rights pursuant to the First and Fourteenth Amendments to the United States Constitution.

This Court initially entered a Temporary Restraining Order against enforcement of the amendments to the Barratry Statute and the Uniform Traffic Act on August 31, 1993. By agreement of the parties, the Court extended the Temporary Restraining Order until the Court's decision after a trial on the merits. The parties also agreed that only certain defendants, Texas Attorney General Dan Morales, Director of the Texas Department of Public Safety Colonel James R. Wilson, Webb County District Attorney Jose Rubio, Jr., and Wichita County District Attorney Barry Macha, would actively participate in the trial. All the defendants agreed to be bound by this Court's decision.

Barratry refers to "the offense of . . . exciting and stirring up quarrels and suits, either at law or otherwise."[1] During the 1993 Regular Session, the Texas Legislature amended the Texas Barratry Statute. These amendments were the legislators' second attempt to restrict barratry in the State of Texas. In 1991, the 72nd Legislature passed House Bill 922, amending Section 35.54 of the TEX. BUS. & COM. CODE ANN., and Senate Bill 857, amending Article 4512b of the TEX. REV. CIV. STAT. ANN. House Bill 922 completely prohibited the use of crime or motor vehicle accident victim information for the purpose of soliciting business and the sale of such information to another person for financial gain. Senate Bill 857 permitted the Board of Chiropractic Examiners to reprimand a licensee for soliciting potential

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[1] BLACK'S LAW DICTIONARY 137 (6th ed. 1990).

patients who had recently been involved in either a motor vehicle or work-related accident. The State of Texas argued that the prohibitions imposed by House Bill 922 and Senate Bill 857 promoted ethical standards necessary for licensed professionals, particularly in the legal profession. Further, the State argued that the restrictions were intended to prevent fraud and misrepresentation by these professionals. Finally, the State argued that it had a substantial interest in protecting the public from inflated insurance rates.[2] Innovative Database Systems, et al., v. Morales, 990 F.2d 217, 221 (5th Cir. 1993). These bills were held to be unconstitutional by the district court, which was affirmed by the Fifth Circuit, because the "outright ban" was "too broad a means of effectuating the intended purpose of the law." Id. at 222.

The amendments to the Barratry Statute that plaintiffs are currently challenging prohibit "attorneys, chiropractors, physicians, surgeons, private investigators licensed to practice in this state or any person licensed, certified, or registered by a health care regulatory agency of this state . . ." from sending any written communications to targeted potential clients with the intent of obtaining professional employment within thirty days of an accident, criminal arrest, or the filing of a civil lawsuit.[3] TEX. PENAL CODE ANN. §38.12(b)(1) (Vernon Supp. 1994).

The Texas Legislature passed House Bill 272, amending the Uniform Traffic Act, which prohibits the release of accident reports for 180 days from the date of the accident. TEX. CIV. STAT. ANN. art. 6701(d), §45(a)

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[2] In the instant case, the State of Texas is not advancing the position of protecting individuals from unnecessarily inflated insurance rates in amending the Barratry Statute and the Uniform Traffic Act.

[3] The Texas Medical Association did not appear as a party to this lawsuit, nor were physicians represented in any capacity. Private investigators also did not appear as parties to the suit.

(Vernon Supp. 1994). The amendments to the Uniform Traffic Act do afford, however, an opportunity for designated classes of people, including insurance agencies and the news media, to obtain such accident reports within 180 days of an accident. The Uniform Traffic Act acts in concert with the Barratry Statute. The amended Barratry Statute provides that accident reports "must include a means of designating whether an individual involved in an accident does or does not desire to be contacted by persons seeking professional employment . . . ." TEX. PENAL CODE ANN. §38.12 (e). The Uniform Traffic Act provides that ". . . the [accident report] forms must include a means of designating whether an individual involved in an accident does not desire to be contacted by persons seeking to obtain professional employment as a professional described by Section 38.12(b)(1), Penal Code." TEX. REV. CIV. STAT. ANN. 6701d §45 (a).

The Supreme Court has held that states may regulate speech that is false, misleading, deceptive or related to an unlawful activity. Central Hudson Gas & Elec. Corp. v. Public Service Comm'n. of New York, 447 U.S. 557, 100 S. Ct. 2343, 65 L. Ed. 2d 341 (1980). However, if a state chooses to regulate speech, it has the burden of proving that the restrictions are justified. Edenfield v. Fane, 123 L. Ed. 2d 543, 113 S. Ct. 1792, 1800 (1992). In restricting commercial speech, states are not required to employ "least restrictive means" as is required for other forms of protected speech. Board of Trustees of State Univ. of N.Y. v. Fox, 492 U.S. 469, 476, 106 L. Ed. 2d 388, 109 S. Ct. 3028 (1989). However, the Supreme Court has also stated that in regulating truthful, commercial speech, the State must prove that its interests in proscribing that speech are substantial, that the regulations advance these interests in a direct and material manner, and that the magnitude of the restriction is

proportionate to the State's interests in the regulation. Edenfield, 113 S. Ct. at 1800; see also Shapero v. Kentucky Bar Ass'n, 486 U.S. 466, 108 S. Ct. 1916, 100 L. Ed. 2d 475 (1988) (stating that "commercial speech that is not false or deceptive and does not concern unlawful activities . . . may be restricted only in the service of substantial government interest, and only through means that directly advance that interest.").

In amending the Barratry Statute and the Uniform Traffic Act, the State of Texas imposed restrictions on commercial speech. In reference to the Barratry Statute, the Legislature directly limits when certain classes of individuals may solicit employment. The amendments to the Uniform Traffic Act impact commercial speech indirectly. By limiting access to the accident reports for 180 days after an accident, to certain classes of individuals, the State is, in effect, thwarting the means by which solicitation is conducted. In its pleadings filed in this case, the State articulated the [**9] following interests as those which are directly advanced by the regulations:

(1) protecting the citizens of Texas from uninvited solicitation letters from attorneys, chiropractors, and other licensed professionals during the thirty-day period when the citizen's judgment may be impaired due to emotional distress; (2) protecting the citizens of the State of Texas from the emotional distress caused by the receipt of unwanted solicitation letters, telephone calls, and in-person visits from attorneys, chiropractors, and other licensed professionals following an accident;[4] (3) protecting the citizens of the State of Texas from false, misleading, and/or deceptive solicitation letters and from telephonic and in-person solicitation; (4)

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[4] The plaintiffs in this case are not challenging the sections of the Barratry Statute which criminalize in-person or telephone solicitation.

protecting the privacy of citizens of the State of Texas; and (5) maintaining and promoting standards of ethical conduct and public confidence in attorneys, chiropractors, and other licensed professionals in the State of Texas.

In order for these regulations to withstand the constitutional scrutiny mandated by the United States Supreme Court, the defendants bear the burden of proving that these interests are substantial state interests, that the State's interest is directly advanced by the regulations and that there is a reasonable fit between the State's interest and the regulation. Fox, 492 U.S. at 480; Central Hudson, 447 U.S. at 564. In this case, each of the interests articulated by the State of Texas, in amending the statutes, has been addressed by the Supreme Court and rejected as not comprising a "substantial state interest."

The challenged regulations are intended to protect Texans from uninvited solicitation letters from attorneys, chiropractors, and other licensed professionals during the thirty-day period when the citizen's judgment may be impaired due to emotional distress and to protect individuals from the emotional distress associated with receiving a solicitation letter. The Supreme Court has specifically addressed the issue of protecting individuals during times of emotional distress. In Shapero v. Kentucky Bar Association, the Court stated that the relevant inquiry in determining whether the State's interests are substantial is not "whether there exist potential clients whose 'condition' makes them more susceptible to undue influence, but whether the mode of the communication poses a serious danger that lawyers will exploit such susceptibility." Shapero v. Kentucky Bar Ass'n, 486 U.S. 466, 108 S. Ct. 1916, 100 L. Ed. 2d 475 (1988).

The defendants contend that the Shapero case is distinguishable from the present case because Shapero

involved direct mail solicitation to potential clients involved in foreclosure suits. The defendants argue that a solicitation letter, like the one involved in the Shapero case, can easily be put aside and not emotionally upset the person receiving it. They contend that a solicitation letter to an accident victim or to a relative of an accident victim could not be as easily set aside as a foreclosure letter because that person would not be thinking clearly or might feel compelled to open all mail from an attorney not knowing if the letter contained important information.[5] However, the Supreme Court in the Shapero case did not limit the holding of the case to the specific facts of receiving a foreclosure letter as opposed to a letter directed to an accident victim. The case clearly holds that states may not regulate commercial speech merely because a recipient of that speech might be emotionally distressed. Shapero, 486 U.S. at 473.

Defendants' expert witness, Richard Lazarus, Ph.D., testified that individuals may suffer from post-traumatic shock disorder for at least six to eight weeks after a traumatic event. These individuals may suffer from impaired decision-making abilities, stress, feelings of confusion and avoidance, denial, guilt, and emotional flatness. Dr. Lazarus explained that the receipt of solicitation mail may exacerbate these feelings within individuals. Thus, although the thirty-day limit might alleviate the possibility of this occurrence, in Dr. Lazarus' opinion a longer time to shield individuals would be necessary.

Defendants' expert witness, Karl Slaikeu Ph.D., testified that a traumatic experience may cast a person into a crisis state which involves difficulty coping with decision

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[5] The proposed, but defeated amendments to the Texas Disciplinary Rules of Professional Conduct would have required the word "advertisement" to appear on the envelope of all direct-mail solicitation by attorneys. See discussion infra.

making, problem solving, and general turbulence. In Dr. Slaikeu's opinion, this crisis time also lasts a minimum of six to eight weeks. Receiving a solicitation letter would add to the crisis situation from which the individual was suffering. Dr. Slaikeu testified that the thirty-day period is only half of the time a person would need to be sheltered from solicitation letters.

Both defense expert witnesses testified that the receipt of a solicitation letter may add to the accident victim's feelings of trauma and crisis. However, the Supreme Court has clearly stated that merely because an individual is potentially more susceptible to undue influence or poor decision-making skills, does not warrant state regulation of truthful, non-deceptive speech. See Shapero, 486 U.S. at 474. The focus is on whether the sender of the solicitation will exploit this potential vulnerability. Id.

The defendants presented no evidence indicating that individuals soliciting clients through direct mail contact do so in order to take advantage of those people suffering from post-traumatic shock or who are in a crisis state. The plaintiffs' evidence at trial demonstrated that direct mail solicitation is targeted at those people who are believed to be in need of certain services and is not targeted at these individuals because they are in a position of weakness.

The State has additionally failed to show that restricting direct mail solicitation directly advances the State's concern for the emotional well-being of the public or that there is a reasonable fit between the State's interest and the regulations. The defendants' experts stated that the desired time within which no contact should take place is six to eight weeks. The Barratry Statute prohibits mail solicitation within thirty days of an accident, arrest, or filing of a civil lawsuit. Although the defendants' expert witnesses

both testified that the six to eight week time period would be a sufficient recovery time, the State did not show that thirty days would substantially advance the State's interest of protecting the emotional well-being of accident victims in any meaningful way. The mere possibility that thirty days might serve some emotional benefit to certain individuals does not substantially advance the State interest. See Shapero, 486 U.S. at 473.

The State of Texas also articulated the interest of protecting its citizens from the emotional distress of receiving unwanted telephone calls and in-person visits. The Court does not reach this issue as the plaintiffs do not challenge the sections of the Barratry Statute that prohibit in-person and telephonic contact.

The amendments are intended to protect individuals from false, misleading, and/or deceptive solicitation. The plaintiffs acknowledge that commercial speech that is false, misleading, or deceptive may be subjected to a total ban. Edenfield, 113 S. Ct. at 1799. The defendants concede that all the plaintiffs, other than Innovative Database Systems ("IDS") and the National Association of Accident Injury Victims ("NAAIV"), engage in truthful, non-deceptive advertising.

John Bechtel ("Bechtel"), one of the plaintiffs in this case, testified that he is the founder of IDS and the NAAIV. The NAAIV, although labeled as an association of accident and injury victims, is comprised only of chiropractors who pay monthly dues of $850.00 to $1800.00 to belong. Bechteltestified that there is not one accident or injury victim associated with the NAAIV. The NAAIV purports to be an association which advances the rights of those involved in accidents and disseminates information to these individuals. The NAAIV does not inform the public it is funded solely by

chiropractors unless asked. The NAAIV also publishes an Accident Advisor Newsletter which purports to serve as an informative medium for accident victims. Defendants contend that the NAAIV is a not a legitimate organization but one whose entire purpose is to solicit business for chiropractors from accident victims.

Attorney Tom Edwards ("Edwards"), a witness for the defendants, testified regarding another potential form of deception and abuse that arises from direct mail solicitation. Edwards testified that he was personally aware of attorneys sending letters to potential clients in divorce cases advising them to avoid service of process and to hide assets. The sentiment among many is that lawyers engaged in this type of misconduct are a disgrace to the legal profession.[6] However, the Supreme Court has stated that "merely because targeted, direct mail solicitation presents lawyers with opportunities for isolated abuses or mistakes does not justify a total ban on that mode of protected commercial speech." Shapero, 486 U.S. at 476. Rather, the State may implement narrower regulations to limit the potential for misleading solicitation. The Supreme Court in Shapero suggested requiring lawyers to file any solicitation letter with a state agency "giving the state an opportunity to supervise mailings and penalize actual abuses." Shapero, 486 U.S. at 477. The thirty day ban does not address the problem of misleading or deceptive communication. The NAAIV and organizations like it may continue to deceptively solicit business after the thirty day period. Therefore, the regulations do not reasonably relate to the goal of protecting the public from deceptive communication. Similarly, the 180-day restriction on access to accident reports is not reasonably related to preventing misleading or deceptive solicitation because any

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[6] See Mark Hansen, Texas Makes Solicitation a Felony, 79 A.B.A. J. 32, 32 (September 1993).

communications sent after individuals gain access to accident reports may still be deceptive. Therefore, the State's purported purpose in preventing false or misleading speech is not being served by the time limits because deceptive communications may still be sent after the expiration of these time limits.

The regulations in question are also overly broad. The Supreme Court has stated that "since state regulation of commercial speech 'may extend only as far as the interest it serves' . . . state rules that are designed to prevent the 'potential for deception and confusion . . . may be no broader than reasonably necessary to prevent the' perceived evil." Shapero, 486 U.S. at 474 (citing Central Hudson, 447 U.S. at 565 and In re R.M.J., 455 U.S. 191, 203, 102 S. Ct. 929, 71 L. Ed. 2d 64 (1982)). It was recently held that a Florida State Bar Rule prohibiting direct mail solicitation within thirty days of an accident was unconstitutional. McHenry v. The Florida Bar, 808 F. Supp. 1543, 1547 (M.D. Fla. 1992) appeal filed, Florida State Bar v. McHenry, 9 F.3d 105 (11th Cir. 1993). In that case, the district court held that the Florida State Bar's articulated interest in protecting the public from misleading direct mail communication was not substantially advanced by a narrowly tailored regulation because misleading solicitations could still be sent after thirty days. Id. Similarly, this Court finds that the State of Texas' articulated interest of protecting the public from false or misleading communications is not substantially advanced by the amendments to the Barratry Statute or the Uniform Traffic Act.

The fourth interest the State of Texas articulated in amending the Barratry Statute and the Uniform Traffic Act is protecting the privacy of its citizens. The issue of protecting individual privacy rights from direct mail solicitation has been addressed by the Supreme Court. In Shapero, the Court

stated that "the invasion, if any, occurs when the lawyer discovers the recipient's legal affairs, not when he confronts the recipient with the discovery." Shapero, 486 U.S. at 477. The amendments to the Uniform Traffic Act prohibit the release of auto accident reports for 180 days from the date of an accident. However, the amendments provide exceptions to the 180-day prohibition whereby certain classes of people, including insurance company agents and the news media, may obtain the accident reports within 180 days. Therefore, any invasion of privacy occurs when the information relating to the accident is released. As the Supreme Court stated, the invasion does not occur when the solicitation is sent but rather when the private information is discovered. Id. The regulations are not reasonably related to the interest of protecting the privacy rights of individuals because the information may be publicly discovered and disseminated by the media and insurance companies. The defendants' witnesses at trial, Joanne Lykins and George Miller, both testified about their experiences with direct mail solicitation after close family members were killed in vehicle accidents. These witnesses testified that they suffered emotional distress not only from receiving solicitation letters but also from media coverage of the accidents and from in-person visits by insurance company representatives in their homes and in the hospital within hours after the accidents. Therefore, limiting access to accident reports pursuant to the amendments to the Uniform Traffic Act does not reasonably relate to the interest of protecting the privacy rights of individuals when the information can be obtained and disseminated by the media and insurance companies.

The defendants contend that the privacy interest extends to individuals criminally charged who should not have to face the embarrassment of receiving direct mail solicitation after an arrest. However, the facts of an arrest

and criminal charges are public records. Therefore, these individuals have no privacy interest concerning the release of this information. Likewise, this analysis applies to civil lawsuits wherein the filing of the action is a also matter of public record.

Finally, the state has articulated the interest of maintaining and promoting standards of ethical conduct and public confidence in attorneys, chiropractors, and other licensed professionals in the State of Texas. The Supreme Court has rejected the concept that allowing attorney advertising undermines ethical conduct in the profession. Bates v. State Bar of Arizona, 433 U.S. 350, 53 L. Ed. 2d 810, 97 S. Ct. 2691 (1977). Solicitation by mail is a form of advertising granted First Amendment protection. Id. at 363.[7]

The defendants also argue that the amendments to the Barratry Statute and the Uniform Traffic Act are legitimate time, place, or manner restrictions on commercial speech. In order for a restriction to be a legitimate time, place, or manner regulation, it must be content-neutral and not favor one type of speech over another. Where the goal is to suppress certain speech in favor of other speech, such a goal is presumptively unconstitutional. Minneapolis Star & Tribune v. Minn. Comm'r of Rev, 460 U.S. 575, 585, 103 S. Ct. 1365, 75 L. Ed. 2d 295 (1983). If the time, place, or manner restriction favors one type of speech over the other, the State must justify the disparate treatment with an overriding government interest. City of Cincinnati v. Discovery Network, Inc., 123 L. Ed. 2d 99, 113 S. Ct. 1505, 1510 (1993). The Barratry Statute and the Uniform

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[7] See Richard Sanders, Lawyer Advertising and Solicitation: the Good, the Bad, the Unethical, 50 Or. St. B. Bull. 5 (1990) (noting that lawyer solicitation and advertising present obvious problems for those concerned with professionalism because they are commercial speech and are therefore afforded constitutional protection).

Traffic Act operate to suppress the commercial speech of certain classes of citizens while favoring the speech of others by exempting them from the restrictions.

The Barratry Statute only restricts direct mail solicitation by attorneys, chiropractors, physicians, surgeons, private investigators, or any person licensed by a health care regulatory agency of the State. All other classes of citizens are not prohibited from soliciting within thirty days of an accident, arrest, or the filing of a criminal lawsuit. The defendants' evidence did not justify treating those targeted by these amendments differently from, for example, insurance companies, body shops, funeral homes, bail bondsmen, or others whose services might be appropriate by reason of the accident, arrest, or lawsuit.

Prior to the amendments to the Uniform Traffic Act, accident reports were public records pursuant to the Texas Open Record Act. The denial of access to accident records effectuates a significant restriction on the ability of the plaintiffs to communicate with potential clients. A state cannot avoid the restraints of the First Amendment by choosing an indirect method of suppressing speech. See Minneapolis Star & Tribune, 460 U.S. at 592. Pursuant to the Uniform Traffic Act, the State of Texas has chosen an indirect method of preventing solicitation by prohibiting access to the information. Because this implicates the First Amendment, the State is required to justify the restriction. The Supreme Court has recently held that states may not enact a law which is arguably neutral on its face if it has a disproportionate impact on First Amendment rights and the intent of the government body enacting the regulation was to suppress those rights. Church of Lukumi Babula Aye v. City of Hialeah, 124 L. Ed. 2d 472, 113 S.Ct 2217, 2227-28 (1993) (holding that a city council's decision to ban the ritualistic slaughter of animals, although neutral on its face,

violated the First Amendment rights of the plaintiff because it disproportionately impacted on their rights and because the City conceded that the law was enacted to prevent the plaintiffs from establishing a church in their municipality).

The State of Texas admits that its intent in amending the Uniform Traffic Act was to restrict this direct-mail solicitation. On the other hand, insurance companies and the general media, among others, have immediate access to these accident reports to continue their speech related activities while denying access to the plaintiffs. The State has not met its burden of justifying the favoring of insurance companies, the media, and others over attorneys, Chiropractors, other health care professionals, and private investigators. See id.

The Texas Legislature, in amending the Barratry Statute and the Uniform Traffic Act, expressed its concern about the ever-increasing number of professionals engaged in barratry. The amendments reflect a desire by the Legislature to eradicate the negative effects of barratry. The sentiment has been expressed, [**26] by attorneys themselves, that ". . . lawyer advertising has been devastating to the image of . . . [the] profession . . . [and that] it's the single most contributing cause of the negative image people have of lawyers."[8] Outrageous examples of lawyer solicitation and advertising exacerbate the negative image associated with lawyers.[9] Images of sleazy attorneys at the scene of an accident feigning concern in order to prey on the weakness of the distraught "casts a blemish" on the entire legal profession.[10] Similarly, media coverage of victims of disasters and their families being bombarded by letters and

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[8] State Sides: Lawyers Seek Crackdown, HOUS. CHRON. December 19, 1993 at 2D.

[9] Eric S. Roth, Confronting the Solicitation of Mass Disaster Victims, 2 GEO. J. L. ETHICS, 967 (1989).

[10] Id.

phone calls from attorneys within hours of an accident contributes to the public perception of lawyers as greedy ambulance chasers[11] and even as "licensed predators."[12]

Many of the problems associated with barratry may stem from an alleged overabundance of attorneys. Some contend that the market cannot adequately provide employment for the numbers of attorneys that the law schools are producing.[13] Plaintiffs' witness, attorney Tim Rusk ("Rusk"), testified that he worked part time at a grocery store to support himself for approximately ten months after graduation from Texas Tech Law School. It was not until he began direct mail solicitation to individuals who had received traffic tickets that he could support himself as an attorney. Rusk testified that ninety-five percent of his income is from direct mail solicitation and that without it he would not be able to earn a living practicing law. Rusk is but one example of an individual who could not practice law without direct mail solicitation.[14]

In amending the Barratry Statute and the Uniform Traffic Act, the Texas Legislature attempted for the second time to limit barratry in the State. Barratry is a pervasive problem in the legal community and in other professions. The Supreme Court has upheld the constitutionality of state

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[11] Id.

[12] Sanders, supra note 7.

[13] See generally Kenneth Conboy, Trouble in Foley Square, N.Y. Times, December 27, 1993, at A15.

[14] It should be noted that not only individual practitioners or small firms have been criticized for allegedly engaging in over-zealousness in their pursuit of clients. A recent New York Times article stated that large law firms exhibited a "meal-ticket mentality," viewing clients as "all you-can-eat buffets" and as "feeding off their carcasses" in charging what was alleged to be exorbitant attorneys' fees. Allison Leigh Cowan, The Business of Bankruptcy Hits Hard Times of Its Own, N.Y. Times, January 12, 1994 at C2.

laws prohibiting in-person attorney solicitation.[15] However, attempts by states to limit direct-mail solicitation and advertising have been generally thwarted by Supreme Court holdings.[16] The Supreme Court distinguished in-person solicitation by attorneys from mail solicitation and other forms of advertising by stating that the State's goal in protecting the public from "fraud, undue influence, intimidation, overreaching, and other forms of 'vexatious conduct'" were compelling interests and were directly advanced by banning in-person attorney solicitation. Ohralik v. Ohio State Bar Assoc., 436 U.S. 447, 98 S. Ct. 1912, 56 L. Ed. 2d 444 (1978). Since the holding in Ohralik, the Supreme Court has consistently rejected outright restrictions on attorney advertising, including direct mail solicitation. In distinguishing in-person and direct mail solicitation, the Court stated that "unlike the potential client with a badgering advocate breathing down his neck, the recipient of a letter . . . can 'effectively avoid further bombardment of [his] sensibilities simply by averting [his] eyes.'" Shapero, 486 U.S. at 477 (quoting Ohralik, 436 U.S. at 465, n.25).

Perhaps the solution to the problems associated with barratry and the concerns of professionalism would best be addressed by entities besides the State, and, as a last resort, the federal courts. The State Bar of Texas did attempt to address some of the problems associated with barratry as it relates to attorneys by proposing amendments to the Texas Disciplinary Rules of Professional Conduct[17] Proposed

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[15] Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 98 S. Ct. 1912, 56 L. Ed. 2d 444 (1978).

[16] See Shapero v. Kentucky Bar Assoc., 486 U.S. 466, 108 S. Ct. 1916, 100 L. Ed. 2d 475 (1988); Zauderer v. Office of Disciplinary Council, 471 U.S. 626, 85 L. Ed. 2d 652, 105 S. Ct. 2265 (1985); In re Primus, 436 U.S. 412, 56 L. Ed. 2d 417, 98 S. Ct. 1893 (1978); Bates v. State Bar of Arizona, 433 U.S. 350, 53 L. Ed. 2d 810, 97 S. Ct. 2691 (1977).

[17] See Proposed Amendments, 56 TEX. B. J. 1039 (1993).

amended Rule 7.05 provided for limitations on attorney direct-mail solicitation by requiring that: (1) a lawyer could not send a written communication to a prospective client if the lawyer knew or reasonably should have known that the client could not exercise reasonable judgment in employing the lawyer; (2) the lawyer knew or reasonably should have known that the prospective client had made known a desire not to receive communications from the lawyer or communications concerning professional employment of a lawyer; (3) the communication involved coercion, duress, fraud, overreaching, intimidation, undue influence, or harassment; (4) the communication contains misleading or false communications; (5) any solicitation be clearly marked with the word "advertisement" on it; (6) that the solicitation not be made to resemble legal pleadings or other legal documents; (7) that the communication not contain a statement that the written communication has received any approval from the State Bar of Texas; (8) that the communication not be sent by registered mail or personal delivery; (9) that the communication not reveal on the envelope the nature of the legal problem; and (10) that the communication shall disclose how the lawyer obtained the information promoting the written communication.

The amendments to the Disciplinary Rules were recommended by the Board of Directors of the State Bar of Texas, approved by the Supreme Court of Texas, and submitted to a vote of the licensed members of the bar.[18] Approval by a majority of not less than fifty-one percent of the total membership of the bar was required by December 20, 1993 for the referendum to be enacted.[19] The bar received ballots from only 44.71 percent of the 57,376

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[18] See TEX. GOV'T CODE ANN. §81.024 (Vernon 1990).

[19] See generally Karen Johnson, Get Out the Vote ... Taking a Stand for the Profession, 56 TEX. B. J. 1022 (1993).

lawyers licensed to practice law in Texas.[20] Thus, the amendments to the Texas Disciplinary Rules of Professional Conduct were not approved by the bar due to insufficient participation by its members.

The relatively low voting response by attorneys to these amendments evidences an apparent indifference among licensed attorneys. Lonny Morrison, President of the State Bar of Texas, stated, "if we default in the adoption of reform rules addressing current and foreseeable problems, the Texas Legislature will act in our stead. If it does, we will have paid an enormous price for our apathy."[21] If the State Bar was authorized by its membership to effectively regulate attorney conduct, the Legislature would not be forced to continually intervene with legislation such as the statutes involved in this case.[22] The bar should and does attempt to serve as a paradigm for professionalism and high ethical standards.[23] Furthermore, public perception of the State Bar and of attorneys most probably would improve if the bar was permitted to implement tough disciplinary rules and itself administered sanctions for offending lawyers. Lynne Liberato, President of the Houston Bar Association, has

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[20] There has been some speculation by the President of the State Bar of Texas, that "major law firms" also did not support the proposed amendments to the disciplinary rules as he surmised that they believed the change would be "difficult . . . . to work with." Jerry Laws, Bar's Advertising Referendum in Trouble, Texas Lawyer December 13, 1993 at 10.

[21] Lonny Morrison, Apathy: 32,377 Professionalism: 24,949, 57 TEX. B. J. 12, 12 (1994); see also, Orrin W. Johnson, The 51 Percent Albatross, Texas Lawyer, January 17, 1994 at 21.

[22] Jim Barlow, Lawyers' Ads Beyond Control, HOUS. CHRON. January 18, 1994 at 1C.

[23] See generally Buford C. Terrell, When a Lawyer Needs a Lawyer: Representing Respondents in Disciplinary Actions, 29 S. TEX. L. REV. 371 (1988).

stressed the importance of improving attorneys' public image:

> We must make every effort to improve the public perception of us. Not because we want to be liked. Not to enhance our image for image's sake. But because we must develop an image that matches the reality that we are problem solvers and that we are the guardians of our system of justice . . . . When people lose confidence in lawyers, they lose confidence in the rule of law. This loss jeopardizes the justice system and threatens to loosen the glue that holds our society together.[24]

Greater emphasis should be placed on improving the overall integrity and ethical quality of licensed attorneys as part of "the responsibility of self-governance."[25] The responsibility of instilling higher ethical standards of conduct in new attorneys might also partially lie with our nation's law schools which have the unique opportunity to emphasize to students their responsibilities as attorneys in our society.

In summation, this Court is faced with deciding the constitutionality of amendments to the Barratry Statute and the Uniform Traffic Act which restrict the commercial speech of certain classes of individuals. The Supreme Court has defined the limits within which states may regulate this area. The Statutes in question do not meet the requirements set forth by the Supreme Court.

For the foregoing reasons, the Court concludes that TEX. PENAL CODE ANN. §§38.12(d)(2)(A), (B), (C), & (D) and TEX. REV. CIV. STAT. ANN. art. 6701d §47(a),(b),(c),(f) are unconstitutional. Defendants shall be enjoined from enforcing these laws. It is therefore

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[24] Lynne Liberato, Small Examples, Great Truths, 31 HOUS. LAW. 6,6 (1993).

[25] Morrison, supra note 21, at 12.

ORDERED that plaintiffs' motion for preliminary and permanent injunctions are GRANTED. It is further ORDERED that TEX. PENAL CODE ANN. §§38.12(D)(2)(A), (B), (C), & (D) and TEX. REV. CIV. STAT. ANN. art. 6701(d) §47(a),(b),(c),(f) are unconstitutional and defendants and their agents are enjoined from enforcing these statutes.

SIGNED at Houston, Texas, on this 19th day of January, 1994.

DAVID HITTNER

s/ David Hittner

United States District Judge

APPENDIX E

MOORE, et al., v. MORALES, et al.
CIVIL ACTION NO. H-93-2170

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

SUPPLEMENTAL ORDER

On January 19, 1994 the Court granted plaintiffs' Motions for Preliminary and Permanent Injunctions in the above referenced cause. In that order, the Court ruled, inter alia, that TEX. REV. CIV. STAT. ANN. art. 6701d §47(a), (b), (c), and (f), is unconstitutional. Due to such ruling, TEX. PENAL CODE ANN. §38.12(e), was thereby rendered unenforceable. However, for purposes of clarification, the Court hereby

ORDERS that TEX. PENAL CODE ANN. §38.12(e) is also unconstitutional and defendants and their agents are enjoined from enforcing this section of the statute.

SIGNED at Houston, Texas, on this the 20th day of January, 1994.

DAVID HITTNER

s/ David Hittner

United States District Judge